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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 22, 1998

Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: WT Docket No. 94-147

Dear Ms. Salas:

Transmitted herewith, on behalf of James A. Kay, Jr., is an original and six (6) copies of his Motion to Recuse Presiding Judge.

Should the Commission have any questions with respect to this filing, please communicate with the undersigned.

Sincerely yours,

Aaron P Shainis

Aaron P. Shainis
Counsel for
JAMES A. KAY, JR.

Enclosure

No. of Copies rec'd 0+6
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Kay Recuse Cover.doc

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In Matter of	)	
	)	
James A. Kay, Jr.	)	WT DOCKET NO. 94-147
	)	
License of one hundred fifty two	)	
Part 90 licenses in the	)	
Los Angeles, California area	)	

To: Administrative Law Judge Richard L. Sippell

MOTION
TO
RECUSE PRESIDING JUDGE

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July 22, 1998

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SUMMARY OF ARGUMENT

The Presiding Judge has prejudged the case. His Orders unequivocally display this prejudgment. His Orders further display bias. It is impossible, under the circumstances, for the Judge to render a fair decision. Thus, recusal is mandated and is appropriate.

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In Matter of	)	
	)	
James A. Kay, Jr.	)	WT DOCKET NO. 94-147
	)	
License of one hundred fifty two	)	
Part 90 licenses in the	)	
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To: Administrative Law Judge Richard L. Sippell

MOTION
TO
RECUSE PRESIDING JUDGE

James A. Kay, Jr. ("Kay"), by his attorneys, and pursuant to Section 1.245(b) of the Commission's rules respectfully requests that the Presiding Judge withdraw from the instant proceeding on the grounds of personal bias. In support, Kay respectfully submits the following:

Preliminary Statement

Kay is reluctantly filing the instant Motion. After extensive deliberations and a review of various rulings by the Presiding Judge, however, Kay feels compelled to file the instant Motion. In this regard, Kay sincerely believes that the Presiding Judge is unable to render an unbiased decision. As will be explained in further detail below, certain rulings of the Presiding Judge contain language that demonstrate bias on the part of the Presiding Judge and the only reasonable interpretation is that the Presiding Judge is incapable of rendering an unbiased and fair decision.

Argument

Kay is aware that mere adverse rulings do not support a charge of bias. Kay is not attempting by this submission to run counter to that well established principle. Rather, predicated on repeated gratuitous comments by the Judge, contained in various orders, Kay has concluded that any hearing proceeding before the Presiding Judge would be unfair and prejudicial.

In a Memorandum Opinion and Order, FCC 98M-85, released June 26, 1998 (Attachment A), the Presiding Judge stated, inter alia, the following:

> 9. Kay has not demonstrated an irreparable injury. The Commission has held that litigation expenses do not constitute an irreparable injury that would justify a stay of a proceeding. Rio Grande Broadcasting Co., 6 FCC Rcd. 7464 (Review Bd. 1991). Moreover, since Kay could still possibly prevail on the merits of this case before the Presiding Judge, the Commission or the Courts, he does not lack an adequate legal remedy. Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 664 (D.C. Cir. 1985). [Emphasis added.]

The phrase, "could still possibly prevail on the merits of this case" is hardly language that one would expect from a Presiding Judge. It conveys the clear message that the Presiding Judge has prejudged the case. It clearly conveys the message that the Judge is not impartial and that Kay does not start this revocation proceeding with the presumption that he is qualified and with the Bureau having the burden of demonstrating otherwise, but, rather, that Kay has the burden of demonstrating to the Judge that he should not have his licenses taken away. Having written words showing a predisposition to decide the case against Kay, the Presiding Judge is hardly the one to see that Kay receives a fair hearing.

A further example of the Judge's bias is illustrated by Memorandum Opinion and Order, FCC 98M-5, released May 15, 1998 (Attachment B). There, at paragraph 8, the Presiding Judge stated the following:

> It appears from the nature of the issues for which Kay seeks further interrogatory discovery that Kay can reasonably ascertain whether or not there are factual merits to the charges and whether or not he has a defense with which to meet them. Specifically, it seems that Kay would know after three years of litigation and from his knowledge of the conduct of his business; whether he operated in the trunked mode; whether he constructed or deconstructed stations; whether there were avoidances of the sharing and recovery rule; and whether any of his stations interfered with other communications systems.

The Presiding Judge has taken a somewhat novel approach to the issues Mr. Kay is facing. Specifically, the Presiding Judge has concluded that Mr. Kay need not be given specific notice of the alleged wrongs or the right to conduct discovery to ascertain such specifics because, after all, he was the one who committed the wrongs! If the Judge had an open and unbiased mind, and if he truly presumed Kay qualified until the Bureau has proven otherwise, he would have a far different attitude as to question of adequate notice. As it is, however, notice and due process concerns have been deemed moot because of the Judge's supposition that Kay was at the scene of the alleged crime. Once again, the bias of the Judge has reared its ugly head.

Further bias is exemplified by Order, FCC 98M-91, released July 6, 1998 (Attachment C). The Judge seeks to prejudice Kay by insisting that Kay commence the presentation of his case prior to the Bureau presenting its case-in-chief. The Presiding Judge, while giving lip service to Kay's position that a revocation proceeding is different from a renewal proceeding, nevertheless cites in his Order defending his position only renewal cases. Moreover, the extent of the Judge's bias is such that he is willing to ignore Section 312(d) of the Communications Act

of 1934. In this regard, by operation of law, both the initial burden of proceeding and the ultimate burden of proof have been placed on the Bureau. Mr. Kay does not need to make any affirmative showing. See Algreg Cellular Engineering, 9 FCC Rcd. 5098, 75 RR 2d 956 (1994).

"Bias" as used in law regarding disqualification of a judge, refers to a mental attitude or disposition of the judge toward a party to the litigation, and not to any views that he may entertain regarding the subject matter involved. State ex rel. Mitchell v. Sage Stores Co., 157 Kan. 622, 143 P.2d 652, 655.

> Blacks Law Dictionary, Fourth Edition, defines bias as follows: Inclination; bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. Maddox v. State, 32 Ga. 587, 79 Am.Dec. 307; Pierson v. State, 18 Tex.App. 558. To incline to one side. Yarbrough v. Mallory, 225 Ala. 579, 144 So. 447, 448. Condition of mind which sways judgment and renders a judge unable to exercise his functions impartially in a particular case. Evans v. Superior Court in and for Los Angeles County, 107 Cal.App. 372, 290 P. 662, 665.

Applying the above-referenced definition, there can be no doubt that the Judge has prejudged the instant case. The June 26, 1998, Order cannot be read to hold otherwise. Clearly, the language chosen by the Judge does not convey or instill confidence that the Judge's decision is not a forgone conclusion.[1]

In Webster-Fuller Communications Associates, 66 RR 2d 1093, 1094 (1989), the Commission enunciated the following:

> To establish a basis for the ALJ's disqualification, one must show personal bias or prejudice that will impair his ability to act in an

[1] Even should the Judge attempt to recant the use of the language in the Order, it would do little to rectify the situation. Even a good faith effort to put toothpaste back into the tube leaves a mess.

> impartial manner. A heavy burden of proof is placed on a party seeking to establish bias.. The alleged bias and prejudice to be disqualifying must stem from an extra-judicial source and result in an opinion on the merits or some basis other than what the judge learned from his participation in the case.

An examination of the Presiding Judge's procedural Order, FCC 98M-40, released April 2, 1998 (Attachment D), demonstrates the extremes to which the Judge is willing to prejudice Kay. In this regard, the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, 76 RR 2d 1393, 10 FCC Rcd. 2062 (1994), at paragraph 15 states as follows:

> It is further Ordered that pursuant to Section 312(d) of the Act, the burden of proceeding with the introduction of evidence and the burden of proof shall be on the Commission.

In spite of this, the Presiding Judge is treating the case like a renewal proceeding without regard to the prejudice this will cause Kay. In this regard, the Judge's April 2, 1998, Order requires Kay to exchange his direct case exhibits prior to making a determination of whether the Bureau had met its statutorily imposed burdens. [2]

Pursuant to said Order, Kay is required to exchange his Trial Brief on July 29, 1998. At footnote 3 of the Judge's Order, the Presiding Judge mandates what is to be included in said briefs, specifically, the following:

> Trial Briefs are to include: (a) summary of the case (e.g. opening argument); (b) summary of testimony and description of the category (categories) of documents to prove or rebut each issue of the HDO; (c) identity of witnesses who will sponsor and explain the meaning of technical documents; (d) sanctions sought by the Bureau including appropriate forfeiture; (e) stipulations that can be

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[2] Kay exchanged his preliminary exhibits on June 29, 1998. See Order, FCC 98M-82, released June 22, 1998.

> agreed to or that either side wishes to have considered; (f) glossary of technical terms that will appear in testimony, documentary evidence and/or argument; and (g) statement of legal points and authorities limited to cases primarily relied on for substantive or procedural points. Trial Briefs shall also include complete summaries of expert witness testimony and any objections that a party expects to raise or anticipates will be raised with respect to expert testimony. See Order FCC 98M-21, released February 24, 1998. Trial Briefs also shall state whether the parties will stipulate at the admissions session to the qualifications of the respective experts which would save hearing time during voir dire.

However, since Kay does not have either the burden of proceeding or the burden of proof, the furnishing of the information requested by the Judge would effectively shift the burdens. It is submitted that the Judge does not have the authority to take actions inconsistent with the Communications Act and his attempt to do so in unconsionable.

The scheduled Admissions Session also serves as an example of how the Judge's bias would prejudice Kay. Pursuant to Section 312(d) of the Act, Kay should not be required to offer any testimony until the Bureau has finished presenting its case. The Presiding Judge is aware that Kay has neither the burden of proceeding nor the burden of proof,[3] but he has ignored that nicety as a result of his bias. In a revocation proceeding, the Licensee never has to demonstrate his innocence or his qualifications until after the Bureau has satisfied its burdens.

The bias of the Judge is further demonstrated by his July 6 Order (Attachment C). That Order purportedly memorialized matters that were covered in the telephone conference call that was initiated by the Presiding Judge on June 30, 1998. Specifically, in that Order, the Judge states as follows:

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[3] See Order FCC 94M-653, released December 22, 1994; Memorandum Opinion and Order, FCC 95M-49, released February 15, 1995; Order, FCC 95M-67, released March 6, 1995.

> The Presiding Judge indicated that he was prepared to rule at the Admissions Session that has been set forth August 4, 1998, that if Kay does not offer these Direct Case exhibits at that time he could waive his right to put on an affirmative case. In that event, Kay would be limited to putting on a rebuttal case after the Bureau rests and is determined to have made a prima facie case. Kay's counsel has taken the position that it would be prejudicial in a revocation case (as distinguished from comparative and renewal cases) to require Kay to put into evidence its Direct Case exhibits before the bureau rests. The Presiding Judge was and is not convinced that Kay would be prejudiced in this case by following the prescribed procedure of an Admissions Session which has never been the subject of an objection by any counsel for Kay until yesterday.[4]

The Judge's position is inconsistent with Commission precedent[5] and violates Section 312(d) of the Communications Act. It is submitted that the Judge's actions are motivated solely by bias, since no rational decision maker could be so inept as to ignore both statute and binding case law precedent. The cases cited by the Judge in support of his decision were decisions considering renewal applicants. The Presiding Judge is well aware of the distinction between Sections 309 and 312 of the Communications Act. The ruling by the Judge, which violates the Act is demonstrative of the extremes the Judge will go to prejudice Kay.

Normally to be disqualifying, bias must be personal in nature and as such usually stems from extra-judicial sources preceding litigation. Thus, comments and rulings of a judge during a proceeding does not ordinarily form the basis for a claim of personal bias. See Kaye

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[4] Counsel requested that the Presiding Judge certify the matter to the Commission. The Presiding Judge refused. However, the Judge's Order is silent on the request and his ruling. Moreover, Kay does not object to the Admissions Session. Kay, however, intends to abide by the Communications Act and does not intend to be coerced into moving for the admission of any exhibits until after the Bureau has rested its case. See Algreg Cellular Engineering, 9 FCC Rcd. 5098, 75 RR 2d 956 (1994).

[5] Cf. Radio Station WTIF, Inc., 2 RR 2d 305 (1964).

Broadcasters, Inc., 35 FCC 2d 548, 24 RR 2d 772 (1972); Chapman Radio and Television Co., 38 RR 2d 231 (1976). The basis of these holdings stem from the belief that these matters are subject to review and can be corrected through the normal appellate process. Botts v. United States, 413 F.2d 41 (9th Cir. 1969), Boyance v. United States, 275 F.Supp. 772 (1967). Here, the Judge's prejudgment of Kay as exemplified by his June 26, 1998, Order and his actions defying congressional mandate (i.e., Section 312 of the Act) are so outrageous as to compel recusal. In point of fact, the Presiding Judge is clearly unable to render either a fair or impartial decision.[6] Moreover, this Presiding Judge is "out of control."

Berger v. United States, 255 U.S. 22 (1921), sets forth the basic test as to whether a presiding officer has demonstrated sufficient prejudice to be disqualified. The Court in Berger found that the facts stated in an affidavit alleging bias are to be taken as true and that:

> to be sufficient an affidavit must show the objectionable inclination or disposition of the Judge; it must give fair support to the charges of a bent of mind that may prevent or impeded impartiality of judgment. 255 U.S. 33-35.

Another case, Wolfson v. Palmieri, 396 F.2d 121, 124 (2d Cir. 1968), likewise holds as follows:

> . . . .[T]o establish the extra-judicial source of bias and prejudice would often be difficult or impossible and this is not required. Comments and rulings by a judge during the trial of a case may well be relevant to the question of the existence of prejudice.

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[6] In light of the instant submission, all parties shall suspect any ALJ decision or ruling. The parties will wonder whether the Presiding Judge is subconsciously overcompensating or undercompensating because of this charge. See Barnes Enterprises, Inc., 40 RR 2d 887 (1977). Recusal, under these circumstances, is clearly in the public interest.

It is submitted that the Presiding Judge's judgment has been so contaminated by partiality against Kay so as to negate his presiding over the proceeding in a fair and objective manner. See Barnes Enterprises, Inc., 41 RR 2d 1035 (1977).

Another test for disqualification is whether "a disinterested observer may conclude that [the ALJ] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." See Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970); Faith Center, Inc., 52 RR 2d 1223 (1982). The Presiding Judge's Orders of June 26, 1998, and May 15, 1998, clearly demonstrate such prejudgment. The Commission has recognized that because "it is not always possible to establish an extra-judicial source for bias...the comments and rulings of the trier of fact may be relevant to the existence of prejudice." Kaye Broadcasters, Inc., 35 FCC 2d 548, 24 RR 2d 772 (1972); Webster-Fuller Communications Associates, 66 RR 2d 1093 (1989); Roy Davis, 66 RR 2d 1103 (1989). The Presiding Judge simply has not dealt with Kay in an evenhanded manner. Specifically, the Presiding Judge's June 26, 1998 Memorandum Opinion and Order, is the antithesis of evenhandedness. ("Kay could still possibly prevail on the merits.") The same could also be said of the April 1, 1998 Order, which prejudices Kay because it flies in the face of the mandates of Section 312 of the Communications Act. In this regard, Kay is expected to testify and to proffer his experts' testimony prior even to the close of the Bureau's case. Moreover, as previously discussed, he is expected to proffer evidence at the same Admission Session as the Bureau.[7] The harm to Kay by following the Judge's improper procedure would be irreparable and could not be corrected through appeal. The Communications Act wisely recognizes the difference between initial

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[7] See Order, FCC 98M-91, released July 6, 1998 (Attachment C).

licensing or renewal proceedings (Section 309) and revocation proceedings (Section 312). If Kay is forced to put in his case prior to the time the Bureau reses, the harm cannot be corrected on appeal.

Additional evidence of the Presiding Judge's bias is contained in the language utilized throughout the Judge's earlier Summary Decision, 11 FCC Rcd. 6585 (1996), which was reversed by the Commission.[8]

In National Labor Relations Board v. Phelps, 136 F.2d 562, 563-64 (5th Cir.. 1943), the Fifth Circuit had the same concerns that Kay has in this proceeding; namely, that he will not be given a full and fair hearing before an impartial trier of fact. In addressing this issue, the Fifth Circuit wrote:

> [A] fair trial by an unbiased and non-partisan trier of facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment at all save a trial

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[8] Kay is not focusing on the substance of the Decision as the basis for the instant Motion. Rather, the extreme language used in that Decision, "Kay chose to reply on June 30, 1994, with unconceited arrogance" (para. 25); "The second episode of stonewalling" (para. 27); "is intentionally obstructive to the prosecution of this case" (para. 31); "There has been an egregious violation by Kay of communications law and policy..." (para. 32). If not for the Presiding Judge's other recent rulings, as detailed above, one could take hope that he had learned from his Summary Decision reversal by the Commission. However, his recent actions show otherwise. It is but a small jump from "there has been an egregious violation by Kay of communications law and policy" to "Kay could still possibly prevail on the merits of this case before the Presiding Judge." The mind set (i.e. bias/prejudgment) is still present.

> from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand. (Emphasis added.)

Kay understands the seriousness of the allegations contained herein and in his Declaration, as well as the relief requested herein. Given the Presiding Officer's perceived bias and prejudice, however, Kay believes that the only way that he will get a fair hearing is if this Presiding Officer immediately withdraws from this case. Kay is prepared to defend himself against the Commission's charges and asks only that the trier of fact be an impartial one.

Attached to the instant Motion is a Declaration of James A. Kay, Jr. (Attachment E). Therein, Mr. Kay states that he believes the Presiding Judge is incapable of rendering a fair decision and has prejudged the facts of the case so that the Judge's decision would be adverse to him. Mr. Kay has no confidence in the Judge's ability to be fair. Further, while the Presiding Judge believes that he has such an ability, appearances are crucial. See e.g. United States v. Hollister, 746 F.2d 420, 425-6 (8th Cir. 1984) ("Avoiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself."); Amos Treat & Co. v. Securities and Exchange Comm., 306 F.2d 260, 267 (D.C. Cir. 1962) ("[A]n administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process."); In re Murchison, 349 U.S. 133, 236, 75 S.Ct. 623, 625 (1955), ("[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" (Quoting Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11 (1954)). See also Metropolitan

Council of NAACP Branches v. FCC, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995) ("In an adjudicatory proceeding, recusal is required only where 'a disinterested observer may conclude that [the decision maker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" (Quoting Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970)). From the foregoing, it is clear that the Presiding Judge has prejudged the case so that there is no possibility of Kay prevailing on the merits.

Should the Presiding Judge not recuse himself, Kay will be compelled to appeal that decision in order to preserve his due process rights under the Constitution, the Administrative Procedure Act, and the Communications Act. As a result, the proceeding will be stayed. See Section 1.245 of the rules. The prompt and fair resolution of the issues is in the interest of all the parties. Therefore, even if the Judge determines that he is not biased, he should nonetheless, in the interest of expedition, recuse himself. The public interest would clearly be better served by such a course of action than the inherent delay that would otherwise result. It is expected that, as an officer of the Court, no Presiding Judge would place his own will before the public interest.

Conclusion

The foregoing unequivocally demonstrates bias on the part of the Judge. Accordingly, recusal is warranted in this case.

Respectfully submitted,

JAMES A. KAY, JR.

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July 22, 1998

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 98M-85

81083

In Matter of	)	WT DOCKET NO. 94-147
	)	
JAMES A. KAY, JR.	)	
	)	
Licensee of one hundred fifty two	)	
Part 90 licenses in the	)	
Los Angeles, California area.	)	

MEMORANDUM OPINION AND ORDER

Issued: June 24, 1998 ; Released: June 26, 1998

1. This is a ruling on a Motion For Stay Of Procedural Dates that was filed by James A. Kay, Jr. ("Kay") on June 15, 1998. An Opposition was filed by the Wireless Telecommunications Bureau ("Bureau") on June 19, 1998.

2. Kay asks for a stay based on the status of a Petition for Extraordinary Relief ("Petition") directed to the Commission that Kay filed on June 12, 1998.[1] In the Petition, Kay alleges "improprieties" that he contends had occurred in the "investigation, designation and prosecution of the instant proceeding." Kay concludes that as a result, he has been "prejudiced and substantial [sic] damaged." Kay asserts that the "integrity of the Bureau's investigation and the legitimacy of the Bureau's charges are being called into question."

3. The Bureau argues that Kay actually is seeking an unauthorized interlocutory appeal; Kay fails to make a legally recognized showing as to how he is being irreparably harmed; Kay's complaints of the propriety of the investigation have no relevance to the evidence (including witnesses) that the Bureau intends to present at hearing; the public interest in finality of this litigation equates with the Bureau's interest to have this case heard and that interest would be substantially harmed if a stay were granted.

4. Since the Petition is before the Commission, the Presiding Judge will limit this ruling to an analysis of the requirements for a stay. It has not even been established that the Commission will consider the Petition. Kay has filed with the Commission a Motion for Leave to File Petition for Extraordinary Relief. Therefore, without further direction from the Commission on whether it will consider the Petition, there can be no basis for issuance of a stay.

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[1] Kay also filed a Motion For Stay Of Procedural Dates that was addressed to the Commission which is the mirror image of the Motion For Stay Of Procedural Dates that is directed to and is under consideration by the Presiding Judge.

5. Standards for a stay are set forth in the case of Virginia Petroleum Jobbers Ass'n v. F.P.C., 259 F. 2d 921 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). Under these authorities Kay must show:

a. a strong likelihood of prevailing on the merits of the Petition;

b. irreparable injury without the stay;

c. the stay will not substantially harm other parties;

d. the stay is in the public interest.

Id. See also Hanover Radio, Inc. 91 F.C.C. 2d 849, 850-50 (Review Bd 1982). For reasons stated below, Kay's Motion fails to meet the burden of persuasion as to each element of this test.

6. Kay has not demonstrated any degree of a likelihood of success on the merits of his Petition.[2] The matters alleged in the Petition are mainly conclusory and argumentative. The conclusions appear to be reached by conjecture and surmise. Nor is there any precedent for staying a license revocation proceeding based on allegations of irregularities in a Bureau's investigation. Kay merely relies primarily on the modification language in Washington Metro, supra , i.e, even if Kay should be less likely to prevail on the merits of the Petition, a stay can still be issued when there are "other factors" requiring a stay. On that point, Kay argues that never before has a Commission hearing been held where "allegations of gross misconduct by an Operating Bureau are pending." There is no citation of authority provided for that statement. Kay further argues that the Commission has intervened in a hearing "to provide relief and correct improprieties" citing Westel Samoa, Inc., 13 F.C.C. Rcd 6342 (1998) and Radio WAVS, Inc., 92 F.C.C. 2d [137] 1037 (1982). Kay makes no analysis of these authorities which, when analyzed, provide no authority for a stay of this case.

7. In Westel Samoa, the Commission ordered a hearing on designated issues that included allegations of wrongful overbidding in an auction by a person who was not a licensee or an applicant. The Commission had no jurisdiction to conduct a hearing as to that person under Section 309 of the Act. But the Commission relied on its broad statutory authority to issue orders that are not inconsistent with the Act and that may be necessary in the execution of the Commission's statutory functions. United States v. Southwestern Cable Co., 329 U.S. 157, 180-81 (1968).[3] The ultimate

---

[2] The Petition is submitted to the Commission by Kay with a Motion for Leave to File Petition for Extraordinary Relief. The Presiding Judge does not have jurisdiction to rule on the merits of the Petition. The contents of the Petition only have been considered for the limited purpose of determining in this interlocutory ruling whether there appears to be any likelihood of success.

[3] See also 47 U.S.C. §309(e) (If --- for any reason the Commission is unable to make the finding it shall formally designate the application for hearing ---. Any hearing subsequently held upon such application shall be a full hearing ---). Westel Samoa, supra at Para. 14. Such broad authority further supports the Commission setting this case for hearing and argues against the grant of a stay.

conclusion in Westel Samoa was that findings of a Notice of Apparent Liability ("NAL") were not binding as to a person named in the NAL who had not paid the forfeiture and who had not had a "full hearing" as provided in Section 309 of the Act. Even though not an applicant or licensee, that person was assured a "full hearing" in the pending proceeding and the designation order was clarified to reflect that conclusion. Id. Kay gives no analysis of that case as applicable to a stay, there is no procedural similarity to the case here, and the Westel Samoa rulings are not applicable to Kay's Motion for Stay.

8. In Radio WAVS, Inc., supra the Commission reviewed the evidence without receiving an initial decision. The case involved issues of a licensee's basic qualifications and the qualifications of an assignee. The Commission found after its independent review of the evidence that there had been no transfer of control or related misrepresentation as was alleged in the designation order. Id. at 1048-49. The Commission specifically ruled:

> The ample undisputed evidence developed through discovery satisfies us that [the assignee] did not assume de facto control --- and that neither party made deliberate misrepresentations to the Commission.

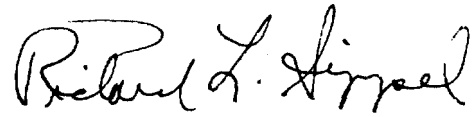
Id. at 1040. Because the Commission in Radio WAVS was readily able to make the above-quoted determination from the discovery record, there was no need for further hearing or an initial decision. Id. at n 11. The Commission decided the merits of the issues that were set in the designation order. There was no stay of the hearing to consider the pre-designation conduct of the Bureau that had conducted the investigation. Therefore, there is nothing in the analysis of Radio WAVS, Inc. that would support any theory of stay in this case.

9. Kay has not demonstrated an irreparable injury. The Commission has held that litigation expenses do not constitute an irreparable injury that would justify a stay of a proceeding. Rio Grande Broadcasting Co., 6 F.C.C. Rcd 7464 (Review Bd 1991). Moreover, since Kay could still possibly prevail on the merits of this case before the Presiding Judge, the Commission or the Courts, he does not lack an adequate legal remedy. Wisconsin Gas Co. v. F.E.R.C., 758 F. 2d 669, 674 (D.C. Cir. 1985).

10. Without making any analysis, Kay asserts that the "remainder of the 'balance of equities' test clearly requires a stay." The Presiding Judge has determined that the Bureau's analysis supports the conclusions that the Commission's mission to enforce the Act and the corresponding public and Bureau interest would be harmed by a stay, particularly in view of the fact that this case has been in litigation since December 1994, and much remains to be done, including a hearing, proposed findings and an initial decision.

Accordingly, IT IS ORDERED that the Motion For Stay Of Procedural Dates that was filed by James A. Kay, Jr. on June 15, 1998, IS DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

[4] Courtesy copies of this MO&O were sent to counsel by fax or e-mail on the date of issuance.

ATTACHMENT B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 98M-55

80849

In Matter of	)	WT DOCKET NO. 94-147
	)	
JAMES A. KAY, JR.	)	
	)	
Licensee of one hundred fifty two	)	
Part 90 licenses in the	)	
Los Angeles, California area.	)	

MEMORANDUM OPINION AND ORDER

Issued: May 14, 1998 ; Released: May 15, 1998

1. This is a ruling on a Motion To Compel Answers To Interrogatories that was filed by James A. Kay, Jr. ("Kay") on May 6, 1998.[1] See Order FCC 98M-54, released May 1, 1998 (pleading cycle set). An Opposition was filed by the Wireless Telecommunications Bureau ("Bureau") on May 13, 1998. Id.

2. At issue are Kay's Further Written Interrogatories that were served on April 14, 1998. There are twelve interrogatories asked with varying subparts.[2] The Bureau has made an overall objection to all of the interrogatories as unauthorized discovery and makes specific objections to several of the interrogatory requests. Kay argues that he is being deprived of sufficient notice of the issues and that he needs the answers in order to prepare and present a defense at the hearing.

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[1] Kay has noted that his pleading exceeds ten pages in length by a factor of three and requests relief from furnishing the prescribed summary. See 47 C.F.R. §1.49(b)(c). The parties shall not need to provide a summary for any pleading that is less than twenty pages in length.

[2] By comparison, the Federal Rules of Civil Procedure (as amended) now provide for only twenty five written interrogatories "including all discrete subparts." See FRCP 33. Leave of court is necessary to serve additional interrogatories which are limited by FRCP 26(b)(2) (limitations apply where discovery is, inter alia, more burdensome than beneficial). Here, Kay has not requested any leave to seek additional interrogatory discovery. The limitations of the Commission's rules apply [47 C.F.R. §1.311(b)] and the twelve interrogatories are found to be far more burdensome to the Bureau and this proceeding than the answers would be beneficial to Kay for use in connection with this proceeding.

3. Substantially similar interrogatories were sought by Kay and denied by the Presiding Judge last month. See Memorandum Opinion And Order FCC 98M-42, released April 7, 1998. The current interrogatories seek in part to obtain information that would be expected to be included in a designated notice to show cause why SMR licenses should not be revoked. The frustration of Kay for more specificity of designated charges is understandable and was so recognized at the outset of the hearing. For that reason, the Presiding Judge adopted two palliative procedures: First, Kay was authorized to propound ten interrogatories for each issue (which was more than would be allowed under the FRCP). The Bureau provided timely and responsive answers. That discovery was completed over three years ago. See Order FCC 95M-28, released February 1, 1995. See also Order 95M-102, released April 7, 1995. Second, the Bureau is required to submit and exchange its case approximately ten days before Kay submits his own case. See Order FCC 95M-28, released February 1, 1995; Order FCC 95M-106, released April 17, 1995; Order FCC 97M-170, released October 14, 1997; and Order FCC 98M-40, released April 2, 1998. That extraordinary procedure of staggered evidentiary exchanges gives only to Kay the privilege to examine the Bureau's entire case for ten days before Kay commits to any defense. Kay will not be heard further to complain about the adequacy of the Commission's notice.

4. As an added assurance to Kay that there will be no surprise at the hearing, the parties also are required to file simultaneous Trial Briefs which will even further lock in their respective cases. And, in even further fairness to Kay, the burdens of proceeding and were assigned to the Bureau as a matter of law. Thus, at every critical stage of the proceeding the Bureau goes first. Kay thereby has the opportunity to see the Bureau's case before he puts on any evidence.[3] The Rules of Practice provide that Kay is only entitled to answers from the Bureau staff regarding: the existence, nature, description, custody, condition and location of Commission records; the identity and location of persons having knowledge of relevant facts; and facts as to which they have direct personal knowledge. 47 C.F.R. §1.311(b)(4). There is no showing in the Motion To Compel and no authority cited by Kay that would require the Presiding Judge to rule contrary to the Commissions discovery rules or to grant the additional discovery which Kay seeks by these further interrogatories.

5. In support of his request for more discovery, Kay cites a Bureau staff memorandum dated September 15, 1994, which preceded the designation of this case for hearing. The memorandum noted in part that: "discovery will reveal that not all of Kay's stations are constructed, and that he exaggerates his loading to avoid the consequences of our channel sharing and channel recovery provisions." This internal document suggests that the case was set for a hearing without the Bureau having sufficient evidence of Kay having actually violated the Commission's construction and loading rules. But the Bureau has committed after discovery closes on May 18, 1998, to disclose those fact issues on which it will offer no proof at the hearing. See Memorandum Opinion and Order FCC 98M-42 n.3, supra. Therefore, there is no purpose to be served in using the disclosures of an internal memorandum as a basis for requiring answers to further interrogatories.

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[3] If the burdens of proceeding and proof had been assigned to Kay, the due process arguments which Kay advances might have some merit. But as illustrated above, there have been customized procedures adopted since the beginning of the litigation of this case to overcome any notice that may be lacking in the designation order.